STATE OF MICHIGAN

COURT OF APPEALS

BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF OAKLAND,

Plaintiff-Appellant,

v

BALD MOUNTAIN WEST and AJAX PAVING INDUSTRIES, INC.,

Defendants-Appellees.

UNPUBLISHED
February 14, 2008

No. 275230
Oakland Circuit Court
LC No. 2004-060824-CC

Before: Gleicher, P.J., and O'Connell and Kelly, J.J.

PER CURIAM.

In this condemnation case, plaintiff appeals as of right from a judgment, in accordance with a jury's verdict, awarding defendant Bald Mountain West ("Bald Mountain") $385,000 as just compensation for a partial taking of defendants' property. We affirm.

I. Basic Facts and Proceedings

Bald Mountain owns a single parcel of real property in Oakland County, and this parcel contains Ellen Road, which was the only east-west road for approximately three miles. Ellen Road connects Lapeer Road and Bald Mountain Road in Orion Township. Bald Mountain had proposed to split this parcel into six sub-parcels. Plaintiff filed a condemnation action against defendants regarding a 15,677 square foot strip of land, approximately 300 feet by 60 feet ("the subject property"), at the south boundary of Bald Mountain's parcel. Plaintiff intended to use the subject property in order to extend Dutton Road, which ended at Bald Mountain Road, and connect it to Brown Road, which ended at Lapeer Road; this east-west extender road is the section road that forms the border between Auburn Hills and Orion Township. As of the date the condemnation action was filed, Bald Mountain's proposed lot split had not yet been approved.

Following a bench trial, the trial court entered an order transferring possession of the subject property to plaintiff, who was ordered to pay an estimated just compensation to Bald Mountain, subject to Bald Mountain's right to seek just compensation above this estimate. Bald Mountain sought just compensation of $1,150,000. The trial court conducted a valuation trial, at which the parties presented expert witnesses on valuation. Plaintiff's appraiser, Michael Kurschat, did not believe that the taking had reduced the value of the remaining property, and he

valued the just compensation at $76,500. Defendants' appraiser, David Burgoyne, opined that the taking had reduced the value of the remaining property and valued the just compensation at $1,150,000. The jury returned a verdict awarding Bald Mountain $385,000.

II. Analysis

Plaintiff argues that the trial court erred in allowing Burgoyne's testimony regarding the reduction in value of defendants' remaining property due to the partial taking. Plaintiff contends that there was no foundation for his testimony. We disagree. We review the trial court's evidentiary rulings for an abuse of discretion. *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842, 849 (2006).

Under both the state and federal constitutions, private property may not be taken for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2. "'[T]he "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain[.]'" *Butler v State Disbursement Unit*, 275 Mich App 309, 312; 738 NW2d 269 (2007), quoting *Brown v Legal Foundation of Washington*, 538 US 216, 235-236; 123 S Ct 1406; 155 L Ed 2d 376 (2003). "The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense." *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999) (citation omitted). "[J]ust compensation includes all elements of value that inhere in the property[.]" *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378; 663 NW2d 436 (2003) (citation omitted).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). Plaintiff concedes that Burgoyne, a licensed certified appraiser, was qualified to provide expert testimony, but argues that there was a "lack of any basis for the methodology employed by Mr. Burgoyne to support his reduction in the value of the property after the taking."

In a partial taking, damages consist of "property taken plus severance damages to the remaining property if applicable. To calculate the severance damages, the parties may present evidence of the cost to cure." *VanElslander*, *supra* at 130 (citation omitted). Thus, "any

evidence that would tend to affect the market value of the property as of the date of condemnation is relevant." *Id*. "Evidence regarding value is to be liberally received." *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 647; 705 NW2d 549 (2005). "The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based on consideration of all relevant facts in a particular case." *Id.* at 648.

Burgoyne and Kurschat both used the market approach to valuation, using recent comparable sales and making adjustments to them. Because, after the taking, Bald Mountain obtained approval for a lot split of the remaining parcel, Burgoyne considered that one of the sub-parcels no longer conformed to Orion Township's two-acre lot area requirement. Burgoyne opined that the value of the remaining sub-parcels was reduced because Bald Mountain had new competition to sell the vacant sub-parcels and it no longer had the only, or even superior, east-west road. Given that the sub-parcels had been "outpositioned" in the marketplace, Burgoyne reasoned that it would either take longer to sell the six sub-parcels or Bald Mountain would have to reduce the price. If the price were reduced, Burgoyne estimated a 25 percent reduction for five of the sub-parcels and 75 percent for the non-conforming one. Alternatively, Burgoyne estimated that it would take an additional two and one-half years to sell the parcels because of the competitive advantage created in an adjacent property by the taking. Given that ten percent is a typical real estate return, Burgoyne multiplied ten percent by two and one-half and arrived at a 25 percent reduction. Burgoyne asserted that this situation was unique, given the fact that the condemned property was used to build a road superior to the road contained in the remaining property, but he applied his experience and the appraisals he had performed.

In this case, evidence was received concerning the market conditions of the subject property's location, the changes in competing developments as a result of extending Dutton Road, and the reconfiguration of the remaining property. Burgoyne identified the factors in evidence that affected his professional opinion concerning the reduction in value of the remaining property after the partial taking, and explained the bases for his opinions. Although plaintiff argues that Burgoyne lacked empirical data to support his claims of reduced value, he used the same essential information and market data that formed the basis for Kurschat's opinion, but arrived at a different conclusion. Although plaintiff disagreed with Burgoyne's analysis and conclusions regarding that data, his opinions were based on his professional judgment after consideration of relevant factors. *Detroit/Wayne Co Stadium Auth, supra* at 648. We agree with the trial court that plaintiff's objections were relevant only to the weight of Burgoyne's testimony, not its admissibility. The trial court did not abuse its discretion in allowing Burgoyne's testimony at trial.

Plaintiff contends that a new trial is required because evidence of a post-taking lot split of plaintiff's parcel should not have been presented at trial. Plaintiff not only failed to object to this evidence, but it affirmatively introduced the evidence at trial to attack defendants' motives and the credibility of their claim for damages. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Because plaintiff introduced both the issue and the evidence concerning the lot split, this issue is waived. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

Plaintiff claims that a new trial is required because the jury's verdict is against the great weight of the evidence. Because plaintiff failed to raise this issue in a motion for a new trial, it has been waived. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 464; 633 NW2d 418 (2001); *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly